

THE RACING PENALTIES APPEAL TRIBUNAL

REASONS FOR DETERMINATION OF MR P HOGAN
(PRESIDING MEMBER)

APPELLANT: ALLEN CHRISTOPHER LEWIS

APPLICATION NO: A30/08/445

DATE OF HEARING
AND DETERMINATION 9 FEBRUARY 1999

IN THE MATTER OF an appeal by Mr A C Lewis against the determination made by the Western Australian Trotting Association Stewards on 3 February 1999 imposing 14 days suspension for breach of Rule 440(a) of the Rules of Harness Racing.

Mr G Winston was granted leave to appear for the appellant.

Mr W Delaney appeared for the Western Australian Trotting Association Stewards.

This is an appeal against conviction.

The appellant was the driver of HAIL THE JUDGE. That horse was a runner in Race 5, the 1999 Harvey Fresh Italian Cup, at Harvey on 30 January 1999.

An incident occurred shortly after the start. At a Stewards' inquiry after the race, on the night, the incident was described by the Chairman of Stewards as follows:

"Going back to Race 5. Mr. Donnell, you drove LADDIE, Mr. Eyre - THE ACCELERATOR and Mr. Lewis - HAIL THE JUDGE. Gentlemen just as I watched the race from the stand opposite the winning post, shortly after the start, you all begun fairly quickly and were angling for positions closer to the rails. Mr. Donnell you dropped down racing to the outside of OF AULD ABERDEEN, Mr. Eyre with THE ACCELERATOR to the outside and HAIL THE JUDGE, to the outside of THE ACCELERATOR and slightly in advance of that pacer. I did note the racing was extremely tight between HAIL THE JUDGE and THE ACCELERATOR. At one stage Mr. Eyre's checked THE ACCELERATOR towards the uprights and shortly thereafter there appeared to be contact with the front leg of LADDIE and the sulky wheel of THE ACCELERATOR and I did note that about the time the contact occurred Mr. Lewis racing outside THE ACCELERATOR has checked HAIL THE JUDGE wider on the track."

The inquiry was adjourned from the night, and resumed on 1 February 1999. It was adjourned again, and resumed on 3 February 1999. After considering the evidence which they required, the Stewards charged Mr Lewis. The charge was in the following terms:

"It's a charge of causing crossing by careless driving issued under the provisions of Rule 440(a) and the specifics of the charge are that racing out of the front straight on the first occasion in Race 5 at Harvey on Saturday the 30th of January 1999, as you've manoeuvred HAIL THE JUDGE down the track you've been tight on THE ACCELERATOR and as a result of that tight racing Mr. Eyre has been obliged to check THE ACCELERATOR down the track, which in turn has resulted in 6 LADDIE being checked on its inside."

The appellant pleaded not guilty. He called three witnesses in his defence.

After considering all of the evidence, the Stewards found the charge proved. In announcing the decision, the Chairman said:

"I had a direct view of the incident from above and I stated in my initial observation that the racing was tight, it was too tight. It is our opinion that from a point prior to the Stewards' tower until shortly thereafter you were too tight on THE ACCELERATOR and you obliged Mr. Eyre to check down the track. Therefore, we do find the charge sustained."

In coming to that conclusion, the Stewards heard from a number of witnesses, and they saw the race film.

Mr Donnell, the driver of LADDIE, said that he did not see a lot (T1). Mr Eyre, the driver of THE ACCELERATOR, said at T2:

"Yeah, I think I've burned down, so we hit that turn really tight and Chris was sort of on my outside – and he's just before I got checked Chris has pulled off, but it was, yeah that's pretty well that ..."

He also agreed that he had pressure on the outside of him from the appellant (T2).

The appellant's initial evidence, at T2 was:

"I've come down with THE ACCELERATOR, I didn't feel as though I put pressure on him to move down the track. I realised that there was horses inside and I stayed out wider and THE ACCELERATOR actually moved down the track, but I didn't – when the incident happened I was clear of THE ACCELERATOR."

Four witnesses gave evidence which tended to favour the appellant. Mr Kimberley another driver in the race, was called by the Stewards at the request of the appellant. Two other drivers, Mr Fry and Mr Warwick were called by the appellant. Lastly, Mr Olivieri, the trainer of HAIL THE JUDGE, was called to give evidence.

The Stewards dealt with the evidence given by those four witnesses. One was found to be inaccurate in his recollection. The evidence of the other three witnesses was found to be of little value because none of them were in a good position to view the incident in its entirety.

The grounds of appeal assert that the appellant was denied justice. As the argument developed before me, it was clear that the appellant's advocate, Mr Winston, was putting two separate submissions. Firstly, that the appellant was denied natural justice in that he was not given sufficient

time to arrange for and call his witnesses. Secondly, that the Stewards were incorrect in convicting the appellant.

The first submission is not made out. It is true that the appellant was required to arrange for his witnesses to be present at short notice. However, the witnesses were called, and it does not appear that the appellant's case suffered in any way. The second submission is not a ground of appeal in the true sense. The Stewards' decision to convict will only be set aside if some error can be demonstrated in the way in which they went about convicting the appellant. In my view, an error was made.

The Stewards had to decide whether the appellant's driving was careless, and if so whether it caused the interference by THE ACCELERATOR on to LADDIE. The Stewards found that carelessness did occur, in that they described the appellant's driving as "*too tight on THE ACCELERATOR*" (T28). They also found that the appellant obliged Mr Eyre to check down the track (T28). The finding that the appellant obliged Mr Eyre to check down the track was simply not open on the evidence.

The only evidence relevant on the point was that of Mr Eyre. The other evidence had been discounted. The Chairman's own observation could not take the matter much further. Whether the appellant forced Mr Eyre down or whether Mr Eyre chose to drive down was a question which could only be answered by Mr Eyre. Mr Eyre did not say that the appellant forced him down.

The various ways in which Mr Eyre described his driving were:

"I had pressure on the outside of me, yes." (T2)

"I you know got a little bit of pressure from the outside and I run down the track. I mean I was coming forward like everyone else ..." (T3)

"I just think that you know because we hit that turn so quickly you know it was just one of those unfortunate things." (T4)

"Occasionally he (THE ACCELERATOR) does run down the track but I don't think that was the case at that point. On there you can see me actually pulling him down." (T5)

Mr Eyre did not say that he drove down, or that he pulled THE ACCELERATOR down, because of the appellant's actions. Despite that, the Chairman attributed Mr Eyre's driving down as being due to the appellant. The Chairman said, at T9:

"It would be our suggestion that the reason he takes hold of the left rein in the first place would be because of the tight racing on his outside ..."

The Chairman's comments at T9 added something to Mr Eyre's evidence which Mr Eyre himself did not say. The appellant himself said, my way of submission at T26:

"... he has reined left, which I agree with you. He has reined left, you'd say 'well why is he reining left'. Well I've got to ask myself the same question, because I am clearly in my mind one hundred percent in my mind I was not forcing him to make that decision to go down the track and I don't know why he did it."

In short, Mr Eyre himself was not asked and did not say why he did it. In these circumstances, this is one of those rare cases where the evidence does not support the finding that the Stewards made, namely that the appellant obliged Mr Eyre to check down the track (T28).

It is for these reasons that I allowed the appeal and set aside the appellant's conviction.

P. J. Hogan

PATRICK HOGAN, PRESIDING MEMBER

